89-1736

No. 89-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUSSELL HOBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether a single attempted purchase of marijuana, which simultaneously violates two statutes prohibiting importation and possession of marijuana, constitutes the "two acts of racketeering activity" required for a "pattern of racketeering activity" under 18 U.S.C. §1961(5) (1978), the Racketeer Influenced and Corrupt Organization Act (RICO).

Whether a jury may consider facts external to those alleged as predicate offenses in order to find the threat of continuing racketeering activity required for a RICO pattern.

Whether an appellate court may affirm a RICO conviction by finding a threat of repetition from acts other than those charged as RICO predicates, when the jury has not been instructed that a conviction may rest upon such a projection into the future.

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OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 893 F.2d 1267; it is reprinted at Appendix A (App. 1a-9a) to this petition.

JURISDICTION

The judgment of the Court of Appeals

was entered on February 7, 1990. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This petition concerns the construction and application of the following provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961-68 (1978) (enacted as the Organized Crime Control Act of 1970, Pub. L. 91-452, Title IX, §901(a), 84 Stat. 941; as amended Pub. L. 95-575, §3(c), 92 Stat. 2465 (1978); Pub. L. 95-598, Title III, §314(g), 92 Stat. 2677 (1978)):

18 U.S.C. §1961. Definitions

As used in this chapter-

(1) "Racketeering activity" means

***

(D) any offense involving ... the felonious manufacture, importation, receiving, concealment,

> buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;
>
> ***
>
> (5) "pattern of racketeering" requires at least two acts of racketeering activity... .

18 U.S.C. §1962. Prohibited Activities

> ***
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity... .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The full texts of the relevant portions of RICO are reprinted at Appendix C (App. 22a-29a).

STATEMENT OF THE CASE

In September 1981, petitioner Russell Hobson ("Hobson") was indicted as a participant in an organization which imported and distributed marijuana. Following a jury trial in the United States District Court for the Northern District of Florida, Hobson was convicted on the six counts charged against him, including conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §1962(d)) and substantive violation of RICO (18 U.S.C. §1962(c)).*

The "pattern of racketeering activity" underlying the RICO convictions was purportedly established by the concurrent

---

* Hobson was also convicted of conspiracy to import marijuana, importation of marijuana, conspiracy to possess marijuana with intent to distribute, and possession of marijuana with intent to distribute.

convictions of Hobson for importation of marijuana (21 U.S.C. §952(a)) and possession of marijuana with intent to distribute (21 U.S.C. §841(a)). The predicate acts of racketeering arose from an event that simultaneously violated two statutes: a single payment on deposit for a shipment of marijuana.

The evidence adduced at trial revealed that in February 1979 one Bill Cobb, an unindicted co-conspirator and a principal in the illicit organization, arranged an attempt to import a cargo of marijuana aboard a Lockheed Constellation airplane. Hobson and co-defendant Patrick Waldrop made a $1,500,000 downpayment to receive the marijuana. Federal agents seized the aircraft and its cargo when it landed in Panama City, Florida. The district court's instructions to the jury expressly limited the

predicate acts charged against Hobson under the RICO counts to only the two substantive drug offenses that arose simultaneously out of the downpayment for the marijuana.

On October 1, 1984, the Court of Appeals for the Eleventh Circuit affirmed the convictions against Hobson. United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984). The court of appeals rejected Hobson's argument that the government's exclusive reliance on the discrete act of a downpayment and the two crimes engendered by that event failed to establish a "pattern of racketeering activity." Bascaro, 742 F.2d at 1360-61. On June 17, 1985, Hobson's petition for certiorari was denied. Hobson v. United States, 472 U.S. 1017 (1985) (No. 84-1148).

On July 1, 1985, this Court issued

its decision in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). The Court construed a "pattern of racketeering activity" as continuing activity and implicitly rejected the view that an isolated event may establish a pattern. See Sedima, 473 U.S. at 496 n.14; see also id. at 527-28 (Powell, J., dissenting).

On September 19, 1985, Hobson filed a petition pursuant to 28 U.S.C. §2255 asserting that Sedima constituted an intervening change in the law entitling him to a reversal of the RICO convictions. The district court denied relief. The Court of Appeals for the Eleventh Circuit affirmed the denial and asserted the continuing validity of its rule that "two separate crimes clearly constitute two separate acts for purposes of RICO," United States v. Hobson, 825 F.2d 364, 366 n.2 (11th Cir. 1987) (App. 15a),

irrespective of the circumstances under which the crimes arose, the statutory definition of a "pattern of racketeering activity," and the legislative intent that RICO be applied in cases of continuing, not sporadic or isolated, activity.

On December 18, 1987, Hobson filed a petition for certiorari limited to the single issue of whether the RICO pattern requirement was satisfied by a single act which simultaneously violated two statutes. On June 26, 1989, this Court decided H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 106 L.Ed. 2d 195, and, one week later, on July 3, 1989, granted Hobson's certiorari petition, vacating the Eleventh Circuit judgment and remanding for further consideration in light of H.J., Inc. Hobson v. United States, 109 S.Ct. 3233, 106 L.Ed.

2d 581.

On February 7, 1990, the Eleventh Circuit again affirmed the denial of Hobson's §2255 motion. United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990) (App. 1a-9a). It held that Hobson had not merely made a downpayment for the marijuana, but had engaged in a series of acts, including making a demand for either repayment of a large sum of money or delivery of marijuana to replace the load lost on the Constellation airplane.*

---

* The Eleventh Circuit is in error on this point. In fact, as the lower court record clearly reflects, the call which Hobson made seeking either return of his deposit or substitution of goods, was placed before he had any knowledge of the Constellation load having been lost (R.38:22-23, Ex. 124). After he learned of the Constellation's seizure, he sought only the return of his money (R.39:20-21, Ex. 131). Neither of the telephone calls represented by Exhibits 124 and 131 was submitted to the trial jury as a possible RICO predicate during the court's instructions.

The Eleventh Circuit found that the demand "by its nature project[ed] into the future with a threat of repetition," citing H.J., Inc. 893 F.2d at 1269; App. 8a-9a. Because of this "projection into the future," the continuity requirement of Sedima was apparently satisfied, and the Eleventh Circuit, for a third time, denied relief to Hobson on his claim that a single downpayment for a load of marijuana could not satisfy RICO's pattern requirements.

REASONS FOR ALLOWANCE OF THE WRIT

The Eleventh Circuit has rendered an opinion in this case which squarely conflicts with opinions from the Eighth and Ninth Circuits on the important and recurring issue of whether a RICO pattern can be premised upon two predicate offenses arising from a single action which

violates two statutes. This issue has been disparately resolved in opinions from the Second, Sixth, Eighth, Ninth and Eleventh Circuits. This petition presents a direct conflict with an Eighth Circuit decision involving identical underlying predicate offenses: in the Eleventh Circuit, a pattern was found; in the Eighth, it was not. This Court's decision is needed to reconcile the circuits.

Additionally, the lower court opinion provides justification for the concern expressed by the four concurring Justices in H.J., Inc. v. Northwestern Bell, 109 S.Ct. 2893, 106 L.Ed. 2d 195 (1989), over the newly-created concept of "threat of continuity." The widely diverging opinions construing the "projection into the future" allowed by H.J.,

Inc. manifest the need for this Court to define the boundaries -- if any exist -- of recourse to "external facts" to prove the continuity required under Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). Many lower courts, primarily concentrated in the Second and Eleventh Circuits, have embraced and radically expanded a dictum from the en banc Second Circuit opinion in United States v. Indelicato, 865 F.2d 1370 (2d Cir.), cert. denied, 110 S.Ct. 56 (1989). There, the court allowed reference to facts external to the charged predicate offenses in determining the existence of continuity or the threat of continuity for a RICO pattern. Now, after H.J., Inc., courts have gone to the lengths exhibited by this petition to affirm a RICO conviction, not on the basis of the predicate offenses, but rather on the

basis of uncharged "external facts." This Court's guidance is needed to develop further the law of RICO patterns of racketeering activity.

Finally, if reference to "external facts" is to be sanctioned by this Court, the lower courts must be reminded that due process requires notice to the defendant and instructions to the jury before convictions may be obtained on the basis of facts beyond the indictment. By affirming on a charge not presented to the grand jury which indicted petitioner, nor to the petit jury which tried him, the Eleventh Circuit decided this case in a way in conflict with applicable decisions of this Court, commencing with DeJonge v. Oregon, 299 U.S. 353 (1937) and Cole v. Arkansas, 333 U.S. 196 (1948).

I.

THE COURT OF APPEALS DECISION THAT A SINGLE ATTEMPTED PURCHASE OF MARIJUANA CONSTITUTES A PATTERN OF RACKETEERING ACTIVITY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Prior to this Court's opinion in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985), lower courts generally recognized that a pattern under RICO required several temporally separate predicate acts. This was the accepted interpretation of the following language in United States v. Turkette, 452 U.S. 576, 583 (1981):

> The pattern of racketeering activity is... a series of criminal acts as defined by the statute.

This requirement of a temporal separation was reinforced in Sedima's footnote 14, 473 U.S. at 496:

> [The] factor of continuity plus relationship which combines to produce a pattern.

The factor of continuity was addressed again in H.J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 106 L.Ed. 2d 195, 209 (1989):

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. [citation omitted] It is, in either case, centrally a temporal concept -- and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear to one another, are distinct requirements.

106 L.Ed. 2d at 209 (emphasis in original).

> Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.

Id. at 210.

Yet, even after this Court has visited the "continuity" area three times in

eight years, a major question remains: whether the temporal concept of "continuity" requires a separation in time between the predicate acts, or whether this requirement can be met by a single episode, fractionated into multiple RICO predicate crimes, which poses a threat of reoccurrence.

This is the question which sharply divides the United States Courts of Appeals. The Second and Eleventh Circuits have explicitly held that the "continuity" requirement for a RICO pattern exists when a single act can be fractionated into two RICO predicate offenses and other evidence demonstrates a threat that this racketeering act will reoccur. This view of the RICO pattern, however, has been rejected by the Eighth and Ninth Circuits.

If this petition is accepted, the conflict will be resolved.

A. The Eighth And Eleventh Circuits Go To War.

Two men, Casperson in Minnesota and Hobson in Florida, were each charged with RICO based upon their involvement in separate, single episode marijuana importation schemes. In each, the defendant's single action was fractionated into two offenses: possession of marijuana and importation of marijuana. Each was convicted of RICO substantive and conspiracy offenses, and each argued on appeal that, although he was properly charged with two marijuana offenses arising from his involvement, a RICO pattern could not be found from his single act. The Eighth Circuit reviewed Casperson's conviction; the Eleventh Circuit, Hobson's.

The Eighth Circuit reversed the Casperson conviction and held:

> We agree with the defendants that it is not proper under RICO to charge two predicate acts where one action violates two statutes. A pattern of racketeering requires "at least two acts of racketeering," 18 U.S.C. §1961(5) (emphasis added), not "at least two statutory offenses." We do not think that the factor of "'continuity plus relationship'" [citation omitted], which Congress thought necessary to establish a pattern, can be present where only a single act, albeit an act that violates two statutes, has been committed.

United States v. Kragness, 830 F.2d 842, 861 (1987) (emphasis in original).

The Eleventh Circuit, however, twice affirmed Hobson's conviction, first holding that "[p]ossessing and importing marijuana are two separate crimes and consequently two separate acts for purposes of the RICO statute," United States v. Bascaro, 742 F.2d 1335, 1360-61 (11th Cir. 1984); and then, on Hobson's §2255

appeal, holding that "two separate crimes clearly constitute two separate acts for purposes of RICO." United States v. Hobson, 825 F.2d 364, 366 n.2 (11th Cir. 1987) (App. 15a).

On remand after this Court's opinion in H.J., Inc., the Eleventh Circuit persisted in its holding that a RICO pattern could be found from two crimes arising from the same act provided that there was other evidence from which it could be inferred that there was a threat of future racketeering activity. United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990) (App. 8a).

B. Other Circuits Enter The Fray On Both Sides.

The precise issue also arose in the Ninth Circuit. In United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989), the defendant was convicted of a Travel

Act violation (18 U.S.C. §1952) based upon a telephone conversation with an undercover F.B.I. agent. The court concluded that Walgren had committed the crimes of bribery and extortion in that single telephone conversation. Id. at 1419, 1425. The government argued that those two offenses provided the predicate acts necessary for the RICO conviction. The court recognized that this raised the Kragness-Hobson issue:

> The question then arises as to whether a single act that encompasses two criminal offenses can be the basis of a pattern of racketeering. This Circuit has not yet spoken on this question. In United States v. Kragness, 830 F.2d 842 (8th Cir. 1987), the Eighth Circuit rejected this argument....

Id. at 1425.

The Ninth Circuit recognized that the Kragness holding was directly in conflict with that of the Eleventh Circuit:

> In contrast, the Eleventh Circuit's standard is "whether each act constitutes 'a separate violation of the ... statute' governing the conduct in question. If distinct statutory violations are found, the predicate acts will be considered irrespective of the circumstances under which they arose." United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) (citations omitted).

Id. at 1426.

The Ninth Circuit distinguished Watchmaker on its facts and adopted the reasoning of Kragness:

> Unlike the defendant in Watchmaker, Walgren did not commit two separate acts. Instead, like the defendant in Kragness, he committed a single act (a telephone conversation) that coincidentally violated both a state and federal law. Walgren's RICO conviction cannot be based solely upon this single act, even though that act may have violated two separate laws.

Id.

Diametrically in conflict with the Ninth Circuit is the Second Circuit's subsequent opinion in United States v.

Kaplan, 886 F.2d 536 (2d Cir. 1989), cert. denied, 110 S.Ct. 1127 (1990). Kaplan in one conversation with Lindenauer offered to bribe Lindenauer and Manes. The Second Circuit concluded that, under the generic definition of bribery, two bribes were committed. It then held, as the Eleventh had held in Hobson, that the simultaneity of the two bribes could constitute a RICO pattern provided a threat of continuity could be found from "facts external to those two acts."

> "[W]here the virtual simultaneity of two acts suggests that they are related, the timing does not negate the existence of a pattern; rather, evidence of continuity or threat of continuity will simply have to come from facts external to those two acts."

United States v. Kaplan, supra, 886 F.2d at 542, quoting United States v. Indelicato, 865 F.2d 1370, 1383 (2d Cir.

1989) (en banc).

The Sixth Circuit, while not faced precisely with the one action/two offense matrix encountered in Hobson and Kragness, has nonetheless indicated quite clearly how that issue would be resolved in its circuit. In United States v. Jennings, 842 F.2d 159, 162-63 (6th Cir. 1988), the court adopted the reasoning of the Eleventh Circuit in Watchmaker, agreeing that a single count in the indictment could constitute two predicate offenses. See also United States v. Licavoli, 725 F.2d 1040, 1046 (6th Cir.), cert. denied, 467 U.S. 1252 (1984) (murder and conspiracy to commit murder constitute two predicate offenses.)

C. The District Courts Respond In Confusion.

District courts in the Second Circuit have reached differing conclusions

concerning the application of Kaplan and Indelicato. In Polycast Technology Corp. v. Uniroyal, Inc., 728 F. Supp. 926 (S.D.N.Y. 1989), the defendants made a single misrepresentation of the financial prospects of a plastics corporation. The court in reliance upon the reasoning of Kragness and Walgren, concluded that this single misrepresentation violated two securities laws. Id. at 945. The court held, "[d]efendants' single set of fraudulent statements cannot be split into two separate acts of racketeering activity." Id.

Shortly after Polycast was decided, another district court in the Southern District of New York was faced with virtually the same facts. The court viewed its issue and that of Polycast in the following language:

> [W]hether two separate violations of the securities laws which arise from

> a single act, such as misrepresentations made in one document in connection with the purchase or sale of securities, can be regarded as charging two predicate acts.

Friedman v. Arizona World Nurseries Limited Partnership, 730 F. Supp. 521, 546 (S.D.N.Y. 1990).

Although the court criticized Polycast's reliance on Kragness and Walgren, it noted the conflict in the circuits and observed that United States v. Watchmaker, 761 F.2d 1459, 1457 (11th Cir. 1985), cert. denied sub nom., Harrell v. United States, 474 U.S. 1100 (1986) and United States v. Licavoli, 725 F.2d 1040, 1046 (6th Cir.), cert. denied, 467 U.S. 1252 (1984), would have dictated a different result. Id. at 547. Finally, the court concluded that, even assuming that multiple misrepresentations in the same document constitute only one RICO predicate act, the fact that there were a num-

ber of victims distinguished the case from Polycast and the court could follow Kaplan and Indelicato.

D. A Possible Peace Treaty.

One apparent reconciliation of the cases emerges from the foregoing opinions. In Indelicato, Kaplan, and Watchmaker, the single act involved more than one victim, while in Polycast and Walgren only a single person was victimized.

Another possible reconciliation, at least of Watchmaker and Indelicato with Kragness and Walgren, is that in the former cases the multiple shootings, which constituted the predicate acts, were not precisely simultaneous, while in the latter cases the alleged predicate acts occurred at exactly the same time.

However, this Court has never recognized either distinction as a principled

basis for determining whether a single act which violates two statutes can be fractionated into two predicate acts and a RICO pattern thereby created. Were the Court to accept either formulation, Kragness would stand and Hobson's RICO convictions would be reversed.

RICO filings have proliferated geometrically since Sedima was decided. Counsel will quickly perceive the significance of the Hobson opinion and will plead single events which violate two laws as RICO patterns. The mailing of a prospectus containing a misrepresentation is an obvious example of an act that is both mail fraud and a violation of securities law. The reasoning of the Second Circuit will continue to spawn RICO allegations in civil cases based upon multiple violations of the securities laws in the same document.

There is no more propitious time for this Court to resolve the conflict in the circuits.

II.

IN FINDING A PATTERN OF RACKETEERING ACTIVITY FROM "EXTERNAL FACTS" BEYOND THE PREDICATE OFFENSES CHARGED IN THE INDICTMENT, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In United States v. Indelicato, 865 F.2d 1370, 1383 (2d Cir. 1989) (en banc), the Second Circuit encouraged courts, in determining the existence of a pattern of racketeering activity, to look for evidence of continuity or threat of continuity in "facts external" to the predicate offenses. Resort to "external facts" was utilized in United States v. Kaplan, 886 F.2d 536, 543 (2d Cir. 1989), cert. denied, 110 S.Ct. 1127 (1990), where the court, recognizing that the proof of a pattern may be insufficient if limited to

nearly simultaneous predicate offenses, looked beyond the predicates to find sufficient evidence. After Kaplan, it has become commonplace for courts to stray about the perimeter of a case's facts in search of pattern evidence, going far beyond the charging document's allegations of predicate offenses.

Thus, courts construing civil RICO complaints on Fed. R. Civ. P. 12(b)(6) motions are routinely examining not only the activity alleged as predicates, but also any other claims in the complaint. See, e.g., Kuczynski v. Ragen Corp., 732 F. Supp. 378, 1989 WL 197799 (S.D.N.Y. 1989); Azurite Corp. Ltd. v. Amster & Co., 730 F. Supp. 571, 580 (S.D.N.Y. 1990); Hall American Center Associates v. Dick, 726 F. Supp. 1083, 1099 (E.D. Mich. 1989); Pyramid Securities Ltd. v. International Bank, 726 F. Supp. 1377, 1382

(D.D.C. 1989).

Because these cases arise in the context of complaint challenges, however, they at least do not present the notice problems encountered by petitioner. He first learned that non-predicate activity would be considered as evidence of a RICO pattern when the Eleventh Circuit reconsidered its affirmance of the denial of his §2255 motion following an H.J., Inc. remand. See section III, infra.

These courts' references to external facts are out of place. Nothing in H.J., Inc. allowed a court to go beyond the charged predicates in determining the continuity component of a RICO pattern. Indeed, the Court was careful to refer to the predicates every time it discussed the concept of conduct "project[ing] into the future with a threat of repetition":

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. (citation omitted). It is, in either case, centrally a temporal concept -- and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements.

* * *

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case.

* * *

A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.

* * *

Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continu-

> ity may be established by showing that the **predicate acts or offenses** are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the **predicates** can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.
>
> * * *
>
> The continuity requirement is likewise satisfied where it is shown that the **predicates** are a regular way of conducting defendant's ongoing legitimate business... .

106 L.Ed. 2d at 195-96 (bold highlighting supplied). Nowhere in H.J., Inc. did the court authorize reliance on non-predicate activity to find a pattern of racketeering activity. Yet, the Second Circuit expressly did so in Kaplan, and the Eleventh Circuit has now done so in Hobson.

Petitioner's case presents the archetype of this phenomenon. With respect to the RICO charges, the indictment informed Hobson that he was accused of en-

gaging in a pattern of racketeering activity consisting of four predicate offenses. Two of the predicates were alleged as overt acts of a conspiracy count, and the other two in separate counts of the indictment. The overt act predicates related to telephone calls placed by Hobson; the count predicates related to Hobson's participation in importing and possessing marijuana.

During the instruction conference, the trial court ruled that the telephone calls alleged in the overt acts could not be considered as predicate offenses by the jury in determining RICO liability (R.42:206, 224-27). The jury was instructed consistent with this ruling (R.44:39). It was further instructed that no defendant could be convicted of the RICO charges "except on the basis of acts of racketeering charged specifically

against him..." which, with respect to Hobson, were expressly limited to the marijuana possession and importation claims (R.44:29). Thus, on the basis of the jury instructions, Hobson could not have been convicted of the RICO counts based on the telephone calls originally set forth in the overt acts. Yet, when the Eleventh Circuit reconsidered Hobson's case following remand in light of H.J., Inc., it found the continuity requirement of a racketeering pattern from the overt-act telephone calls. The court held that those calls, which had been expressly excluded from the jury's consideration as predicate offenses, by their very nature "'project[ed] into the future with a threat of repetition.'" United States v. Hobson, 893 F.2d at 1296, quoting H.J., Inc., 106 L.Ed. 2d at 195.

By its holding, the Eleventh Circuit has raised the Indelicato/Kaplan concept of "external facts" to a new RICO art form, far surpassing anything this Court envisioned in H.J., Inc. There are presently no apparent limits upon the lower courts' abilities to go beyond the charged predicate offenses in seeking to determine the continuity required for a RICO pattern.

This Court, in carrying out its role as the Supreme Court, should accept certiorari in this case and establish the conditions under which courts will be allowed to find a pattern of racketeering activity from facts beyond those alleged in the indictment as constituting the racketeering activity. In short, the Court should use this case to establish the rule that a pattern of racketeering activity can be found, if it is to be

found at all, from only that activity specifically denominated as predicate offenses in the charging documents.

III.

IN AFFIRMING HOBSON'S CONVICTION ON A THEORY CONTAINED IN NEITHER THE INDICTMENT NOR THE JURY INSTRUCTIONS, THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

As noted in the preceding section of this petition, the only predicate offenses upon which the jury was allowed to find a pattern of racketeering activity, were the marijuana offenses identified by the government as RICO predicates. The trial court's jury instructions made that clear, and expressly barred consideration of any activity beyond the two marijuana-related predicates.

But in affirming the denial of Hobson's §2255 motion, the Eleventh Cir-

cuit went beyond the charged predicates to find a threat of continued activity, a threat which would "project into the future."

When it affirmed Hobson's conviction on the basis of activity not alleged as racketeering acts, the Eleventh Circuit denied Hobson due process:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process.

Dunn v. United States, 442 U.S. 100, 106 (1979); see also Carella v. California, 109 S.Ct. 2419, 105 L.Ed. 2d 218, 224 (1989) (Scalia, J., concurring); Jackson v. Commonwealth of Virginia, 443 U.S. 307, 314 (1979); Presnell v. Georgia, 439 U.S. 14, 16 (1978); Rabe v. Washington, 405 U.S. 313, 315 (1972); Gregory v. Chicago, 394 U.S. 111, 112 (1969); Cole v. Arkansas, 333 U.S. 196, 201 (1948);

and DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

By deciding the appeal on a basis different from that used in Hobson's indictment or trial, the Eleventh Circuit placed itself at odds with established precedent of this Court which, if applied to petitioner, would require reversal of his RICO convictions. Not every case involving resort to "external facts" to determine the continuity component of a RICO pattern presents this issue. Thus, for example, in United States v. Kaplan, the trial court specifically instructed the jury that it could consider non-predicate offense activity in determining the existence of a pattern. 886 F.2d at 543. In the case at bar, however, no such instructions were given the petit jury.

If the Cole and DeJonge line of

cases noted above continues to have vitality, this Court will accept the petition for certiorari and remind the lower courts that, if they refer to "external facts" in assessing the "existence of continuity or threat of continuity," adequate notice must be provided the defendant and guiding instructions tendered to the jury.

CONCLUSION

Petitioner acknowledges the difficulties recognized by the Court in H.J., Inc.: "The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racke-

teering activity' exists." 106 L.Ed. 2d at 210.

However, petitioner respectfully asserts that this case provides the ideal vehicle for the Court to put to rest questions which, in the case of the first issue presented by this petition, predated Sedima and continue to arise after H.J., Inc., and, in the cases of the remaining issues presented by this petition, came into being as a direct consequence of H.J., Inc.

One need only examine the advance sheets to realize that RICO litigation has not diminished. If anything, the volume has increased as a consequence of the H.J., Inc. ruling which refused to limit RICO's application to multiple episode complaints. Yet, serious questions continue to arise relating to the RICO pattern concept.

A grant of certiorari in the instant case will help answer many of the questions which are dividing the lower courts.

Dated: Milwaukee, Wisconsin

May 7, 1990.

Respectfully submitted,

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APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Russell HOBSON,

Defendant-Appellant.

Russell HOBSON,

Petitioner-Appellant,

v.

UNITED STATES of America,

Respondent-Appellee.

Nos. 85-3517, 86-3589.

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Feb. 7, 1990.

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD,* HILL,* and ESCHBACH,** Senior Circuit Judges.

REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

The judgment in this case was vacated by the Supreme Court and the case remanded for further consideration in the light of H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. _____, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Hobson v.

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*Judges Godbold and Hill were in regular active service when this case was originally submitted and decided.

** Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

U.S., 492 U.S. ____, 109 S.Ct. 3233, 106 L.Ed.2d 581 (1989). The narrow issue presented by Hobson in his petition for certiorari, and restated in his brief before us on remand, is "whether an isolated act which simultaneously violates two statutes may be charged as 'two acts of racketeering activity' demonstrating the 'continuity' necessary to establish 'a pattern of racketeering activity' under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(5)."

The predicate acts relied upon for conviction of Hobson under the substantive RICO count arise in the context of his conviction under two other counts for

aiding and abetting importation of a load of marijuana aboard a Constellation aircraft and aiding and abetting possession of the same load of marijuana aboard the Constellation aircraft with intent to distribute. In his direct appeal to this court, and in his petition for certiorari to the Supreme Court, Hobson has asserted that he committed only one isolated act relating to the importation and possession counts which consisted of making (together with his partner Waldrop) a $1.5 million advance payment for the load of marijuana aboard the Constellation, which act, he says, does not meet the continuity requirements of H.J., Inc.

For purposes of this decision we assume the correctness of Hobson's contention that the $1.5 million advance payment related to only the shipment of marijuana aboard the Constellation aircraft and did not relate to an earlier aborted shipment of marijuana on a DC-3 aircraft, which had been seized upon its arrival at the Ft. Lauderdale, Florida airport. With respect to the Constellation smuggling venture, the evidence showed that Hobson, his partner Waldrop, and co-defendant Cobb, were organizers. Hobson and Waldrop agreed to purchase most if not all of the shipment. The Constellation was flown to Colombia and loaded with

marijuana. Trucks furnished by Waldrop and Hobson came to an agreed-upon clandestine landing site in Florida where the Constellation was scheduled to arrive. But because of weather and mechanical problems, the craft was compelled to land in Panama City, Florida in lieu of the clandestine site. Federal agents were ready and waiting upon its arrival and seized it. After the Constellation effort proved unsuccessful, Hobson, in a telephone conversation that was intercepted and taped, pressured Cobb to produce the marijuana or return the advance payment.

In H.J., Inc., the Supreme Court

adopted a flexible, commonsense approach. It rejected the application of RICO to sporadic activity and widely separated and isolated criminal acts and offenses. It looked to relationship and continuity. Hobson does not question application of the relatedness concept but only continuity. As the Court pointed out, continuity is both closed- and open-ended, for it may refer to a closed period of repeated conduct or to "past conduct that by its nature projects into the future with a threat of repetition." 492 U.S. at ____, 109 S.Ct. at 2902. The predicate acts themselves may involve a threat of long-term racketeer-

ing activity. Or, the threat of continuity may be established by showing that the predicate acts are part of an organizational entity's regular way of doing business. Id.

Hobson's characterization of the issue misconceives the facts. The facts described above, limited to the Constellation endeavor, did not involve merely a single isolated act of paying money but rather a series of acts, including a demand for repayment of a large sum of money or delivery of marijuana to replace the load lost on the Constellation, which "by its nature project[ed] into the future with a threat of repetition." H.J.,

Inc., 492 U.S. at ___, 109 S.Ct. at 2902.[1]

The orders of the district court denying Hobson's motion to vacate under 28 U.S.C. § 2255 and his motion for new trial are AFFIRMED.

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[1] Because we limit our discussion to the Constellation endeavor, we do not need to consider the great range of long-term activities of the organization, embracing massive movements of marijuana into Florida and Georgia by ship and plane over an extended period of time, in some of which activities Hobson was involved.

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Russell HOBSON,

Defendant-Appellant.

Russell HOBSON,

Petitioner-Appellant,

v.

UNITED STATES of America,

Respondent-Appellee.

Nos. 85-3517, 86-3589.

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Aug. 25, 1987.

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD and HILL, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

PER CURIAM

Hobson was convicted in 1981 on six counts relating to the importation and distribution of marijuana. He was sentenced to 35 years imprisonment, a fine of $110,000, and a two-year special parole term. His conviction was affirmed by the Eleventh Circuit in U.S. v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), cert. denied, 472 U.S. 1017, 105 S.Ct.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

3476, 87 L.Ed. 2d 613 (1985).[1] Hobson's subsequent motion for a new trial based on newly discovered evidence was denied by the district court. Hobson's appeal of this decision (No. 85-3517) was stayed pending the resolution of his motion to vacate his sentence under 28 U.S.C. §2255.

Hobson raised four issues in his §2255 motion before the district court: (1) ineffective assistance of counsel; (2) insufficiency of evidence to support conviction on any count; (3) government knowingly suppressed evidence; and (4)

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[1] For a discussion of the facts underlying Hobson's conviction, see Bascaro, 742 F.2d at 1341-42.

inadmissibility of wiretap evidence. The district court adopted the magistrate's initial and supplemental recommendations and denied Hobson's §2255 motion. Hobson appeals the district court's adverse ruling on two issues only, insufficiency of evidence and inadmissibility of the wiretap evidence. This appeal (No. 86-3589) was consolidated with his appeal of the district court's denial of his motion for a new trial (No. 85-3517). In both appeals we affirm the district court's denial of Hobson's motions.

The district court refused to grant Hobson's §2255 motion on the ground of insufficiency of evidence because Hobson had raised this issue on direct appeal

and lost. The Eleventh Circuit also rejected this claim in Hobson's petition for writ of error coram nobis. The district court reasoned that the law is well settled that prior consideration of a defendant's sufficiency of evidence claim precludes further review. We find no error in this reasoning. See Ordonez v. U.S., 588 F.2d 448, 448-49 (5th Cir.) (per curiam), cert. denied, 441 U.S. 963, 99 S.Ct. 2409, 60 L.Ed. 2d 1068 (1979); see also U.S. v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 1977, 90 L.Ed. 2d 660 (1986); U.S. v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981) (per curiam); U.S. v. Johnson, 615 F.2d 1125, 1128 (5th Cir.

1980) (per curiam); U.S. v. Greer, 600 F.2d 468, 469 (5th Cir.), cert. denied, 444 U.S. 902, 100 S.Ct. 213, 62 L.Ed. 2d 138 (1979); Buckelew v. U.S., 575 F.2d 515, 517-18 (5th Cir. 1978); McGee v. U.S. District Court, 489 F.2d 703, 704 (5th Cir. 1973) (per curiam).[2]

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[2] Hobson's argument that we should reconsider our prior ruling on the sufficiency of the evidence supporting his RICO convictions in light of Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985) is unpersuasive. Sedima's footnote explaining that two acts of racketeering do not constitute a pattern unless they have continuity does not necessarily change this circuit's rule, as applied in Hobson's direct appeal, that two separate crimes clearly constitute two separate acts for purposes of RICO. See Bank of America Nat'l Trust & Savings Assn. v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986).

The district court held that because Hobson had lost on his claim regarding the inadmissibility of the wiretap evidence before the trial court and on appeal, it would not hold an evidentiary hearing and reconsider the issue in a collateral proceeding under §2255. The district court did not abuse its discretion. See Kaufman v. U.S., 394 U.S. 217, 227 n.8, 89 S.Ct. 1068, 1074 n.8, 22 L.Ed. 2d 227 (1969); Buckelew v. U.S., 575 F.2d 515, 517-18 (5th Cir. 1978); Vernell v. U.S., 559 F.2d 963, 964 (5th Cir. 1977) (per curiam), cert. denied, 435 U.S. 1007, 98 S.Ct. 1876, 56 L.Ed. 2d 388 (1978). This court ruled on Hobson's

direct appeal that the wiretaps were sufficient under Florida law and the evidence derived from them was therefore admissible against him. Bascaro, 742 F.2d at 1347-48. A subsequent Florida trial court decision that reached the opposite conclusion should not affect our prior ruling on direct appeal.

The district court denied Hobson's amended motion for a new trial based on the newly discovered evidence that the prosecutor allegedly accepted a bribe from Clyde Cobb, a government witness. Hobson contends on appeal that the district court abused its discretion in failing to conduct an evidentiary hearing

before denying the motion.

To prevail on a motion for a new trial based on newly discovered evidence, five elements must be present:

> (1) The evidence must be discovered following the trial; (2) The movant must show due diligence to discover the evidence; (3) The evidence must not be merely cumulative or impeaching; (4) The evidence must be material to issues before the court; and (5) The evidence must be of such a nature that a new trial would probably produce a new result.

U.S. v. Bollinger, 796 F.2d 1394, 1401 (11th Cir. 1986). Hobson failed to show that these five elements were present. First, the district court properly discredited the evidence relied on by Hobson in his motion for a new trial because it

was based on uncorroborated and conclusory statements by convicted co-defendants.[3] See U.S. v. Simmons, 714 F.2d 29, 31 (5th Cir. 1983); U.S. v. Metz, 652 F.2d 478, 480-81 (5th Cir. Unit A 1981). Second, Hobson has failed to demonstrate

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[3] Hobson relied on the following newly discovered evidence: (1) Cobb admitted to Tommie Lee, a co-defendant in a related case, that he had bribed the prosecutor; (2) Cobb admitted in a letter to his pre-indictment lawyer that he had bribed the prosecutor; (3) another co-defendant admitted having bribed the prosecutor; (4) Manuel James, who was a co-conspirator's attorney and who was later convicted as a defendant in the case, acknowledged that he had given Cobb's bribe to the prosecutor; and (5) prosecutor resigned the day after James gave his testimony to the grand jury regarding the alleged bribe.

how the allegations of bribery, if introduced at a new trial, would produce a different result. The only benefit to Hobson from this evidence would be in its added impeachment value against Cobb, who testified against Hobson at his original trial. In light of the extensive impeachment of Cobb's testimony and the overwhelming evidence presented on Hobson's guilt, any additional impeachment material with respect to Cobb would have been cumulative and not likely to produce a different result at trial. See U.S. v. Johnson, 713 F.2d 654, 662 (11th Cir. 1983), cert. denied, 465 U.S. 1030, 104 S.Ct. 1295, 79 L.Ed. 2d 695 (1984);

Bentley v. U.S., 701 F.2d 897, 899 (11th Cir. 1983).

AFFIRMED.

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APPENDIX C

STATUTES INVOLVED

Racketeer Influenced and Corrupt Organizations Act (RICO),

18 U.S.C. §§1961-1962 (1978)

§1961. D. Definitions

As used in this chapter --

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18,

United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations),

section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, sec-

tion 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

* * *

(5) "pattern of racketeering activity" requires at least two acts of rack-

eteering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

§1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any

part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such

purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.